Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-772

In the Supreme Court of the United States

OCTOBER TERM, 1978

GARRETT FREIGHTLINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The judgment of the court of appeals was entered on June 21, 1978, and an order denying rehearing was entered on July 31, 1978.* The time for filing the petition for a writ of certiorari was not extended and therefore expired on October 30, 1978. 28 U.S.C. 2101(c). The petition was filed on November 9, 1978, and is thus out of time. The time limit of 28 U.S.C. 2101(c) is jurisdictional. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

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*Petitioner's statement that the order denying rehearing was entered on August 10, 1978, is incorrect. A certified copy of that order, bearing the correct date, is reprinted in the Appendix to this opposition. But even if the order had been entered on August 10, 1978, the petition still would be untimely. The 90th day from August 10, 1978, is November 8, 1978.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12

APPENDIX

May Term-July 31, 1978

Before Honorable Oliver Seth, Chief Judge
Honorable David T. Lewis, Circuit Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable Monore G. McKay, Circuit Judge
Honorable James K. Logan, Circuit Judge

No. 76-2078

GARRETT FREIGHTLINES, INC., Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellee, Garrett Freightlines, Inc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, and Circuit Judges Lewis and Doyle.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS, Clerk

HOWARD K. PHILLIPS, CLERK

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By
/s/ Sezanne Barrett
Deputy Clerk